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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-598

E. P. SHANNON, ET AL.,

Petitioners,

v.

GENOVEVA MORALES, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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To the United States Court of Appeals for The Fifth Circuit:

Petitioners, Trustees and Administrators of the Uvalde, Texas, Independent School District, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 23, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. "A", *infra*, pp. A-1, et seq.) is not yet reported. The Order Overruling Petitioners' Motion

for Rehearing entered on August 19, 1975 (App. "B", *infra*, p. A-10) and the Order entered on August 15, 1975, denying a stay of the mandate (App. "C", *infra*, p. A-11) are also unreported. The Memorandum Opinion and Order of the United States District Court for the Western District of Texas, Del Rio Division (App. "D", *infra*, pp. A-12, et seq.) is reported at 366 F.Supp. 813.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on the 23rd day of July, 1975, and the Order Overruling Petitioners' Motion for Rehearing was entered on the 19th day of August, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals apply the proper legal standard in determining the existence of segregative intent on the part of the School District in this *de facto* school desegregation case?

2. Did the Court of Appeals err in refusing to strike from the Appellate Record materials submitted by Respondent which were never a part of the Record in the trial court nor before the trial judge in any fashion?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in the resolution of this case: (1) Fourteenth Amendment to the United States Constitution; (2) 42 U.S.C. § 1983; and (3) Rule 10(a), Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE

1. *Proceedings before the District Court*

The Petitioners are the members of the Board of Trustees of the Uvalde, Texas, Independent School District, the Superintendent of Schools and a former principal of one of the elementary schools therein.* Respondent is a Mexican-American resident of the school District and a parent of children attending schools therein. Respondent has accused the School District of discriminating against Mexican-Americans in violation of the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1964 [42 USC § 2000(d)].

The Memorandum Opinion of the district court (*infra*, pp. A-12 through A-48) sets forth the facts of this case with clarity, and such facts will not be totally reiterated here in the interest of brevity. Suffice it to say that the School District is located in South Texas, approximately 75 miles from the U.S.-Mexico border; has operated since approximately 1900; presently educates approximately 4,000 students of whom about 65% have Spanish surnames (referred to throughout the various opinions in this case as "Mexican-Americans"). The School District has only one high school, one junior high school and, at the time of trial, four elementary schools, plus a separate location for kindergarten which is offered, under Texas law, on an optional basis whereby the kindergarten-age child is not required to attend, as in the case of the other grades. Following the trial and before the rendition of the opinion of the Court of Appeals, the School District annexed additional territory containing one elementary school (Batesville), approximately thirty miles from Uvalde, which had and has a Mexi-

*Hereinafter referred to as "the School District".

can-American scholastic population of approximately 89%. The opinion of the Court of Appeals contains a table setting forth the ethnic distribution of students in each of the school facilities (*infra*, p. A-2). This is a *de facto*, case, in that Texas law at no time mandated the separate education of Mexican-American and Anglo students (there are only twelve Negro students in the entire system and no issue has been presented in this case relative to them).

The City of Uvalde, which comprises the bulk of the geographic area of the School District, reflects well defined residential separation as between Mexican-Americans and Anglos. There has been no evidence of any involvement of the state, county, city or School District relative to such residential segregation nor any claim of "state action" bringing about such housing patterns.

The Complaint sought relief in the form of a traditional desegregation decree relative to student assignment, faculty and staff hiring, promotion and assignment and the like.

The district court, in February 1973 and following the conclusion of a lengthy trial, entered its Memorandum Opinion in which it found no segregative intent on the part of the Uvalde school officials to segregate Mexican-American children or to deny equal educational opportunity to them in any way and totally exonerated the Defendants from any liability. That opinion was rendered, however, while *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), was pending before this honorable Court but after submission therein. Accordingly, the district court chose to withhold the entry of an order until it could have the benefit of this Court's decision in *Keyes*. Following the *Keyes* decision, the district court, in August 1973, rendered and filed its Supplemental Opinion and Order (*infra*, pp. A-49, et seq),

denying all relief to the Respondent on the basis of an absence of segregative intent on the part of the Petitioners.

2. *Proceedings before and decision of the Court of Appeals*

Respondents appealed, claiming that the district court applied the wrong standard in requiring a finding of segregative intent, and that even if that standard was proper the evidence was insufficient to support the district court's conclusions. This was the first *"de facto"* desegregation case reaching the Fifth Circuit since its decision in *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir., 1972) (*en banc*), in which it specifically rejected the "segregative intent" test and held that there was no distinction between *de facto* and *de jure* segregation; that all that need be shown by plaintiffs in such a case is "cause and effect", such as the construction of a school in a neighborhood populated principally by an ethnic minority.

Because this was the first "de facto" case reaching the Fifth Circuit since this Court's opinion in *Keyes*, Petitioners made a Motion for an *en banc* Hearing, which was denied.

Respondent filed, along with her Brief in the Court of Appeals, a voluminous document designated as "Appendix A", which consisted of pleadings from an administrative proceeding involving the School District and the Departmet of Health, Education and Welfare. None of these pleadings had been offered or introduced in evidence before the trial court nor formed any part of the Record below. Accordingly, Petitioners moved to strike such surplusage from the Appellate Record and require the deletion of references to it in the Brief of Respondent, which was based primarily on the HEW material. The Court of Appeals, in response

to that Motion, stated that it would carry it along with the case on the merits but at no time made a definitive ruling on it. This issue was again brought to the attention of the Court of Appeals in Petitioners' Motion for Rehearing, which was denied without comment by the court, concerning the Motion to Strike. The court's obvious consideration of that material and refusal to strike it from the Record in contravention of Rule 10(a) of the Federal Rules of Appellate Procedure is the subject of the second question presented to this honorable Court herein.

At the outset, the Court of Appeals recognized that this Court, in *Keyes,* had effectively "supervened" the Fifth Circuit's holding in *Cisneros.* The court, however, proceeded to ignore *Keyes* and set aside the trial court's factual determinations on the basis of what was, in effect, a "cause and effect" test.

Petitioners' Motion for Rehearing was routinely overruled.

REASONS FOR GRANTING THE WRIT

I.

THE LEGAL STANDARD DETERMINING INTENT TO SEGREGATE

The Fifth Circuit in formulating a standard by which to judge segregative intent has devised a standard which effectively ignores the guidelines set out by this Court in *Keyes* and is in conflict with the decisions of other Courts of Appeal.

A. THE FIFTH CIRCUIT HAS NOT USED THE LEGAL STANDARD DEMANDED BY *KEYES* TO FIND SEGREGATIVE INTENT.

The Fifth Circuit did not correctly apply the standard in *Keyes* when it held that the district court's finding of no segregative intent was clearly erroneous. Under the guise of segregative intent, the Fifth Circuit has reverted to the cause and effect test it used in *Cisneros*.

The Fifth Circuit, prior to the *Keyes* decision, abandoned the *de facto/de jure* distinction in its opinion in *Cisneros* v. *Corpus Christi Independent School District*, supra:

> "Thus, we discard the anodyne dichotomy of classical de facto and de jure segregation. We can find no support for the view that the constitution should be applied antithetically to children in the north and south, or to Mexican-Americans vis a vis Anglos, simply because of the adventitious circumstances of their origin or the happenstance of locality." 467 F.2d 142 at 148.
>
> "Discriminatory motive and purpose, while they may reinforce a finding of effective segregation, are not necessary ingredients of constitutional violations in the field of public education. We therefore hold that the racial and ethnic segregation that exists in the Corpus Christi school system is unconstitutional — not de facto, not de jure, but unconstitutional." 467 F.2d 142 at 149.

This position was clearly overruled by *Keyes*. The Fifth Circuit, in its opinion below, recognized that its holding in *Cisneros* had been "supervened" by *Keyes* (App. "A", *infra*, page A-3).

Justice Powell's separate opinion in *Keyes* (concurring in part and dissenting in part) makes it clear that the *de jure/de facto* distinction is still valid and highlights the burden of proof which this Court requires for a determination of *de jure* segregation.

"This court has come a long way since *Brown I*. Starting from the unassailable de jure ground for the discriminatory constitutional and statutory provisions of some states, the new formulation — still professing fidelity to the *de jure* doctrine — is that desegregation will be ordered despite the absence of any segregative laws if:

(i) Segregated schools in fact exist;

(ii) A court finds that they result from some action taken with segregative intent by the school board;

(iii) Such action relates to any "meaningful segment" of the school system; and

(iv) The school board can not prove that its intentions with respect to the remainder of the system were non-segregative". 413 U.S. 189 at 230.

The Fifth Circuit's determination of intent was based upon four findings. The court found (1) that there had been a Mexican school in the district since 1907, (2) that in 1954, Robb Elementary School was built in an Anglo section of Uvalde, (3) that in 1966, a neighborhood system of pupil assignment was adopted as to the urban students and, (4) that a freedom of choice system was continued as to the rural students who are bussed to school. In no instance did the Fifth Circuit examine the reasons offered by the School District for any of these occurrences. In no instance did the Fifth Circuit articulate how these occurrences amounted to segregative intent. The Fifth Circuit made no attempt to correlate these actions with segregation in a "meaningful portion" of the School District. Instead, after a cursory description of these events, the court summarily declared that segregation was obviously the motivation for these acts. This type of analysis does not meet the constitutional test of purpose or intent demanded

by *Keyes*. The Fifth Circuit went no further than the extent of their inquiry in *Cisneros*. In *Cisneros*, a finding of unconstitutional segregation was based primarily upon a statistical analysis of the number of Mexican-Americans and Anglos in each school. In this case, the Fifth Circuit noted that the racial composition of the area in which Robb Elementary School was constructed was predominately Mexican-American. Once again, the Fifth Circuit has relied upon a simple statistical analysis to supply the constitutional element of intent demanded by *Keyes*.

The evidentiary basis for these findings is less than compelling. For example, the finding that there was a "Mexican school" in the district since 1907 was based solely upon a minute entry in the school records of 1907 to repair the roof on the "Mexican school."

Primary emphasis was placed by the Fifth Circuit on the pupil assignment program adopted by Uvalde Independent School District in 1966. In so doing the Court failed to mention that this program was the result of a study by a bi-ethnic committee of 10 Mexican-Americans and 10 Anglo district patrons. This program was pronounced by the Court to be strong, indeed overwhelming, evidence of segregative intent. What the court did was equate the assumed effects of these actions with purpose or intent. The difference between finding the effects of a school district's action and finding the purpose or intent behind those actions was well understood by this Court in *Keyes*. Justice Powell noted this difference in his separate opinion.

> "The court today does move for the first time toward breaking down past sectional despairities, but it clings tenaciously to its distinction. It searches for a *de jure* action in what the Denver school board has done or failed to do, and even here the court *does not rely*

> *upon the results or effects of the board's conduct* but feels compelled to find segregative intent. 413 U.S. 189 at 230.

If this Court allows the Fifth Circuit to reduce intent to a cause and effect study then the distinction between *de facto* and *de jure* segregation will be effectively destroyed and *Keyes* will be overturned.

B. THERE IS CONFLICT IN THE COURTS OF APPEAL ON THE PROPER STANDARD FOR ASCERTAINING SEGREGATIVE INTENT.

The Courts of Appeal are split as to the correct test for segregative intent. The Second Circuit and the Eighth Circuit have adopted tests similar to that used by the Fifth Circuit. The Ninth Circuit, Sixth Circuit and First Circuit have taken positions in conflict with the Fifth Circuit.

The Fifth Circuit's cause and effect test has been applied since their decision in this case. *U.S.* v. *Midland Independent School District,* No. 71-3271 (5th Cir. Aug. 28, 1975) emphasized the statistical breakdown of the elementary schools by race to find *de jure* segregation. There was no finding of purpose or intent to segregate. The court indicated that intent to segregate could be inferred from the school zone policy and the student transfer policy because segregation was the "natural and foreseeable consequence" of adoption of these policies.

The Second Circuit has adopted a test similar to that used by the Fifth Circuit.

> "Unless the Supreme Court speaks to the contrary, we believe that a finding of de jure segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and

> foreseeable consequences of causing educational segregation." *Hart* v. *Community School Board of Education, New York School District #21.* 512 F.2d 37,50 (2d Cir. 1974).

This "natural and foreseeable consequences" test focuses upon the actions undertaken and ignores evidence of motivation. The reasons for the action are of no importance if the court finds that a racial imbalance could have been predicted prior to the undertaking.

The Eighth Circuit in *Omaha* v. *Webb*, No. 73-0-320 (8th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3106 (U.S. August 21, 1975) (No. 75-270), not only held that segregative intent could be established through the natural, probable and foreseeable consequences of an act or omission but that once such a foreseeable consequence was shown a presumption arose in favor of the plaintiff and the defendant has the burden of establishing that segregative intent was not among the factors that motivated their actions.

The Ninth, Sixth and First Circuits, however, have demanded evidence of segregative intent before the actions of a school district may be declared unconstitutional. In *Johnson* v. *San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974), the circuit court rejected the district court holding that proof of intent was unnecessary if the school authorities exercised power in a way which increased racial imbalance.

> "*Keyes* and *Soria* [v. Oxnard School District Board of Trustees, 488 F.2d 570 (9th Cir. 1973)] were filed after the decision by the District Court in this case. Quite understandably, therefore, the District Court made no finding as to whether the school board possessed the requisite segregatory intent. On the contrary, the District Court treated proof of intent as unnecessary.

> "In the context of segregation" it held "[the term *de jure*] . . . means no more nor less than the school authorities have exercised power given them by law in a manner which creates or continues or increases substantial racial imbalance in the schools. It is this governmental action, regardless of the motivation for it, which violates the Fourteenth Amendment." 339 Fed.Supp. at 1319. As *Keyes* and *Soria* have now made clear, the District Court thereby applied an erroneous legal standard in determining that a constitutional violation had occurred." 500 F.2d 349 at 351, 352.

In *Higgins* v. *Board of Education of City of Grand Rapids,* 508 F.2d 779 (6th Cir. 1974), the court also demanded proof of segregatory intent before the actions of a school board would be declared constitutionally impermissible. The Sixth Circuit held that an inference of segregative intent was permissible from the foreseeable consequences of a school district's action but that such an inference was rebuttable.

The First Circuit in *Morgan* v. *Kerrigan,* 509 F.2d 580, 592 (1st Cir. 1974) based its finding of segregatory intent not only on the normal inferences from "consciously consummated acts" but also on the expressed motivation of the school board.

C. THE FIFTH CIRCUIT HAS MISINTERPRETED THE DEFINITION OF DE JURE SEGREGATION IN *KEYES.*

Keyes rejected the argument that there was no constitutional difference between *de facto* and *de jure* segregation. The thrust of the decision was not to equate *de facto* segregation and *de jure* segregation but to redefine what is meant by *de jure.* By declaring the differentiating factor to be purpose or intent, *Keyes* held that the previous existence of a statutorily mandated dual system was not

a prerequisite to a finding that *de jure* segregation existed in a school district. *De jure* segregation exists when the state or any of its agencies has acted, with an intent to segregate, by statutory enactment or otherwise. This is a broad standard, but it does not abolish the distinction between *de facto* and *de jure* segregation. *De facto* segregation remains constitutionally permissible.

The Fifth Circuit declared Uvalde Independent School District to be a system of *de facto* segregation which was unconstitutional because of the presence of segregative intent. This holding confuses the reasoning of *Keyes*. *Keyes* held that only *de jure* segregation was unconstitutional and that *de jure* segregation is characterized by segregative intent. The Fifth Circuit's misinterpretation of this formula results in a contradictory holding. The Fifth Circuit does not seem to realize that the categories of "*de facto* segregation" and "presence of segregative intent" are mutually exclusive.

This misinterpretation of *Keyes* should be corrected by this Court to avoid the appearance that *de facto* segregation has now been declared unconstitutional.

II.

DID THE COURT OF APPEALS ERR IN REFUSING TO STRIKE FROM THE APPELLATE RECORD MATERIALS SUBMITTED BY RESPONDENT WHICH WERE NEVER A PART OF THE RECORD IN THE TRIAL COURT OR BEFORE THE TRIAL JUDGE IN ANY FASHION

The decision of the Fifth Circuit was based in part upon extraneous materials not properly part of the record before the trial court and for that reason alone should be

remanded. The court refused to strike these documents over the objection of the Petitioner. That such materials should not have been considered part of the records is clear from Rule 10 of the Rules of Appellate Procedure.

> "Rule 10(a) Composition of the record on appeal. The original papers and exhibits filed in the District Court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the District Court shall constitute the record on appeal in all cases".

In *Durkin* v. *Lovknit Manufacturing Company*, 208 F.2d 665 (5th Cir. 1953), the court acknowledged that documents not made part of the record in the district court could not be considered on appeal.

It is clear that the extraneous material can not be justified under Rule 10(e), Correction or Modification of the Record.

> "Rule 10(e) is apparently intended to "supplement" a record, not to supply in substance a large new record never before the District Court and never considered by it." *United States Ex Rel. Mulvaney* v. *Rush*, 487 F.2d 684 (3rd Cir. 1973).

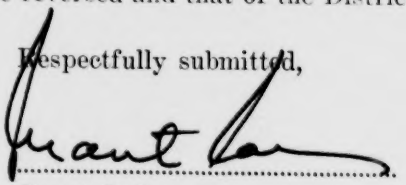
Borden, Inc. v. *Federal Trade Commission*, 495 F.2d 785 (7th Cir. 1974), was a suit seeking injunctive relief to restrain the Federal Trade Commission from proceeding on an administrative complaint. The court of appeals held that it had no authority to admit on appeal any document which was not made a part of the record in the district court. The petitioner in *Borden* sought to have included in the record, documents pertaining to administrative procedure by the Federal Trade Commission. In this case, the respondent brought to the court of appeals documents dealing with administrative proceedings before the De-

partment of Health, Education and Welfare. Since these documents were not part of the record before the trial court, they should not have been considered by the court of appeals and failure to strike them clearly amounts to error on the part of that Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals and its decision should be reversed and that of the District Court affirmed.

Respectfully submitted,



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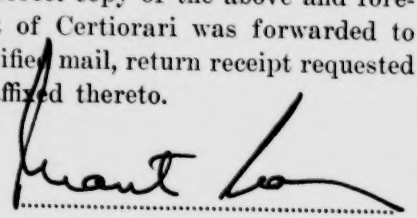
CERTIFICATE OF SERVICE

I do hereby certify that on this the 20th day of October, A.D., 1975, a true and correct copy of the above and foregoing Petition for Writ of Certiorari was forwarded to opposing counsel, by certified mail, return receipt requested with sufficient postage affixed thereto.



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